Nos. 94-1397 & 94-1422

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD ARRINGTON, JR., *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

JOHN W. MARTIN, *et al.*,

Petitioners,

vs.

ROBERT K. WILKS, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Question Presented

Whether an affirmative action program embodied in a consent decree that, as implemented by a municipal employer, arbitrarily sets aside 50% of all promotional opportunities for blacks when blacks comprise some 10% of the qualified labor pool and fails to permit all qualified candidates to compete for all openings and have their relative qualifications considered unnecessarily trammels in violation of Title VII and is overbroad in violation of the Constitution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
A. Proceedings Leading to the Consent Decrees	3
B. The Consent Decrees.	6
C. Post Consent Decree Proceedings	7
D. The Modification Proceedings.	10
E. The 1991 Trial and Decision of the District Court.	10
F. The Decision of the Eleventh Circuit	13
SUMMARY OF THE ARGUMENT	16
ARGUMENT	17
I. The Eleventh Circuit's Decision Is Consistent With Current Precedent Governing Valid Affirmative Action	17
A. *Croson* Provides The Standard For Constitutional Scrutiny of the City's Conduct.	17

B. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedents. 19

C. The Eleventh Circuit's Decision Is Not In Conflict With Other Circuits. 21

II. The Eleventh Circuit Correctly Found The City's Affirmative Action Plan Was Overbroad In Violation Of *Croson*. 23

III. The City Has Unlawfully Trammeled The Interests Of Plaintiffs In Violation Of Title VII. 27

Conclusion 30

TABLE OF AUTHORITIES

Cases	Page
Aikens v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994)	6, 21
Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) (en banc, Posner, J.), *cert. denied*, 114 S.Ct. 290	18
Bridgeport Guardians v. City of Bridgeport, 933 F.2d 1140 (2d Cir. 1991)	25
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	*passim*
Cunico v. Pueblo School District, 917 F.2d 431 (10th Cir. 1990)	18
Davis v. San Francisco, 890 F.2d 1438 (9th Cir. 1989)	18
Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994)	18, 22
Ensley Branch of the NAACP v. Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980)	3
Ensley Branch v. Seibels, 31 F.3d 1548 (11th Cir. 1994)	10, 24
Fullilove v. Klutznik, 448 U.S. 448 (1980)	23
Hayes v. North State Law Enforcement Officer Association, 10 F.3d 207 (4th Cir. 1993)	18
Hazelwood School District v. United States, 433 U.S. 299 (1977)	25
In re: Birmingham Reverse Discrimination Employment Litigation, 39 FEP Cases (BNA) 1431 (N.D. Ala. 1985)	8

Cases **Page**

In re: Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989) 8, 9, 18

Johnson v. Transportation Agency, 480 U.S. 616 (1987) ..... *passim*

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 221 (1986) 17, 19, 20

Local 93, Firefighters v. City of Cleveland, 478 U.S. 501 (1987) 18

Martin v. Wilks, 490 U.S. 755 (1989) 5,9

Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985) 25

Peightal v. Metro Dade County, 940 F.2d 1394 (11th Cir. 1991) 18

Podbesesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) .. 17

Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) 18, 26

United Black Firefighters Association v. City of Akron, 976 F.2d 999 (6th Cir. 1992) 18

United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983) 5, 7

United States v. Paradise, 480 U.S. 149 (1987) ..... *passim*

United Steelworkers v. Weber, 443 U.S. 193 (1979) . 17, 19, 20

Wygant v. Jackson Bd. of Education, 476 U.S. 267 (1986) 5, 14, 23, 26

Cases **Page**

Youngblood v. Dalzell, 804 F.2d 360 (6th Cir. 1986) 25

Statutes and Rules

Rule 24, F.R.Civ.P. 5

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Plaintiffs-respondents Robert K. Wilks, et al. are fifteen individual white male employees of the City of Birmingham Fire & Rescue Service ("BFRS") and one white male employee of the City of Birmingham Engineering Department.[1] Each would have been promoted to a position as a Fire Lieutenant, Fire Captain or Civil Engineer but for the race conscious conduct of the City of Birmingham ("City"). The respondents filed individual suits against the City, Mayor Richard Arrington, Jr., and the Personnel Board of Jefferson County ("Board") under Title VII and the Equal Protection Clause. The defense to these suits was premised upon a claim of compliance with consent decrees entered in litigation to which respondents were not parties. The Eleventh Circuit Court of Appeals correctly held that the City's race-conscious actions violated Title VII and the Constitution.

Opinions Below

Respondents adopt the statement of opinions of the lower courts of petitioners Arrington and City of Birmingham. City Pet. 2.

Jurisdiction

Respondents adopt the statements of jurisdiction of the petitioners. City Pet. 2; Martin Pet. 2.

Statutes Involved

Respondents adopt the statement of Constitutional Provisions And Statutes Involved of petitioners Arrington and City of Birmingham. City Pet. 2; City App. 269a-270a.

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[1] In addition, an association of employees of the City is a plaintiff respondent.

Statement of the Case

A. Proceedings Leading to the Consent Decrees.

During 1974 and 1975, racial discrimination suits were filed by the United States, the Ensley Branch of of the NAACP, and a class of black persons led by petitioner-plaintiff John W. Martin. *United States v. Jefferson County, et al.*, CV-74-P-666-S and consolidated cases (N.D. Ala.). The complaints charged that the City of Birmingham ("City"), the Personnel Board of Jefferson County (the "Board"), Jefferson County and numerous other municipalities under the jurisdiction of the Board had engaged in employment practices resulting in unlawful discrimination against blacks and women in violation of Title VII of the Civil Rights Act of 1964, other federal statues and the Equal Protection Clause. The district court severed the issues for separate trials.

The 1976 trial addressed whether the Board's use of entry level Office Worker, Firefighter, and Police Officer examinations unlawfully discriminated against blacks. On January 10, 1977, the district court found that the Board's use of the Firefighter and Police Officer tests violated the Title VII rights of blacks. No violation of law was found in the use of the Office Worker test. Citing the good faith voluntary efforts of the Board to administer non-discriminatory tests and affirmatively recruit blacks for public employment, the district court rejected the claims of the United States and other plaintiffs under the Equal Protection Clause. The claim that the tests discriminated against women was dropped. As a remedial device, the district court ordered the Board to comply with a short term referral quota of blacks and thereafter achieve a goal of referral of blacks for entry level Firefighter and Police Officer positions based on applicant flow. No relief was ordered against the City. The district court's order, in relevant part, was upheld on appeal. *Ensley Branch of the NAACP v.*

Seibels, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

Following entry of the 1977 Order, many blacks were referred by the Board to the City and hired as firefighters. By the time of entry of the 1981 Decree, the City had hired 52 black firefighters. App. 248a.[2] After 1976, blacks were hired as firefighters at rates in excess of expectations based on availability in the labor pool. App. 46a, 255a.

A second trial was held in August and October 1979. At issue were eighteen additional tests and various other screening devices and rules used by the Board. BFRS promotional examinations were not among those challenged. 1985-DX-1428, 1429. As in the first trial, the City did not participate and any independent claims against the City were never tried.

Prior to the court's decision in the second trial, and following the election of Mayor Richard Arrington, Jr., counsel for the original parties (the City, Board, United States, and Martin plaintiffs) engaged in lengthy, secret negotiations which resulted in comprehensive consent decrees between the plaintiffs and the City and the Board. App. 109a (hereinafter "City Decree") and App. 203a (hereinafter "Personnel Board Decree").

In the process of the negotiation of the City Decree, the City continuously pressed for high fixed quotas with little monetary cost while the government urged goals based on twice the black representation in the applicable pool. App. 6a-9a. The City Council made no findings of past discrimination

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[2] Respondents will use the same format for citation of the trial court record and exhibits as used by the petitioners. See Martin Pet. at 2, n.1. References to the appendix to the City Petition, no. 94-1397, will be to App. XXa; the appendix to the Martin Petition, no. 94-1422, is referenced as AXX.

and paid little attention to the goal provisions of the Decree. Their primary concerns were cost and politics. 1991-PX-11 (pp. 217-234); 1991-PX-13; 1991-PX-14. Following approval of the Decree by the Birmingham City Council, the City's attorneys continued negotiations and then agreed to a 50% annual goal for the promotion of blacks to Fire Lieutenant jobs. App. 10a. The Decree had no termination date. App. 11a. The evidence was without dispute that racial politics played a significant role in the City's approval of the Decree.[3]

The two decrees were tendered to the district court and provisional approval was summarily entered on June 8, 1981. There was no actual notice of the pendency of the Decrees made to nonminority City employers sufficient to bind their interests. *Martin v. Wilks*, 490 U.S. 755 (1989). The Birmingham Fire Fighters Association appeared at a fairness hearing held on August 3, 1981 and objected to the proposed decrees. On August 4, 1981, it moved to intervene as of right under Rule 24, F.R.Civ.P.[4]

The district court entered an Order approving the two consent decrees on August 18, 1981. A106. The court's accompanying Opinion rejected all objections to the decrees and approved the settlement under a "reasonableness" standard.[5]

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[3] Councilman Clifford testified: "Whether it's stated or implied, [race] is always an issue." 1991-PX-14 (p. 36).

[4] The district court's statement that intervention was sought on August 19, 1981 is a mistake. City App. 72a.

[5] The approval of the Decrees was never reviewed by the Court of Appeals because the Eleventh Circuit dismissed the appeal from the denial of intervention. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The statement of the Martin petitioners that approval of the City Decree was affirmed by the Eleventh Circuit is wrong. Martin Pet. 2.

The "reasonableness" standard was sharply criticized as having "no support in the decisions of this Court" in *Wygant v. Jackson Bd. of Ed.*,

(Footnote continued)

A117. The district court found the motion to intervene untimely since "the litigation has been pending for over five years and has been vigorously contested by the existing parties through two trials and one appeal." A117.

B. The Consent Decrees.

The City Decree required the achievement of a long term goal of "the employment of blacks and women in each job classification in each department of the City of Birmingham in percentages which approximate their respective percentages in the civilian labor force of Jefferson County as defined by the [1980] Federal Census." Hence, the City's goal was to employ blacks in 28% of all positions in each separate job classification and women in 43% of all positions in each separate job classification. App. 90a. The Decree also required the City to achieve annual goals for appointment of blacks to some 100 of the 500 job classifications at rates from 25% to 50% or the percentage of black representation in the applicant group, whichever was higher. *Id.* For example, the City was thereby required to award 50% of Fire Lieutenant promotions and 50% of Police Sergeant promotions to blacks until achievement of the long term goal (28%) for blacks in each of those jobs. App. 90a, 91a, 114a-119a.

The Personnel Board Decree required the Board to utilize "selection standards or procedures which the Board can demonstrate either have no adverse impact or have been validated in accordance with the *Uniform Guidelines*." App. 207a. The Board Decree further authorized the Board to make efforts toward "revisions in scoring and ranking procedures which may be followed which will reduce or eliminate any adverse impact on blacks or women and which would continue to

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476 U.S. 267, 279 (1986) (plurality); *see also, Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994).

provide a sufficient pool of qualified candidates for certification and selection in accord with the goals of this Decree." App. 207a-208a. The Board Decree required that the Board ensure that blacks or women were certified for consideration for certain jobs at specified percentage rates and, in all respects, that the Board certify sufficient numbers of additional blacks and women as necessary to allow the City to meet the goals for appointment of blacks and women specified in the City Decree. App. 224a-225a.[6]

C. Post Consent Decree Proceedings.

On appeal by the Firefighters Association from the denial of its 1981 motion to intervene, the Eleventh Circuit found that the district court did not abuse its discretion by denying intervention to the nonminority employees in the consent decree proceedings. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). The appeals court determined that the firefighters would suffer no prejudice by a denial of intervention since individual fire fighters were free to "institute an independent Title VII suit asserting the specific violations of their rights." Hence, the Eleventh Circuit did not then address the validity of the Decree.

Numerous independent Title VII/Equal Protection claims were filed by white male employees of the City of Birmingham.

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[6] Under the state law "Rule of Three", the Board certified the top three persons in the Register for a job opening. The City then appoints from the certified list of three. Under the Board Decree, it must also separately certify the highest ranking black or female on the Register -- no matter how far down the list. The record developed in 1985 demonstrated that the City and Board had to jump over some 80 qualified whites in order to certify and promote some black employees. During the period relevant to this case, the Personnel Board always certified two lists based on race for the jobs at issue. Those lists are in evidence. The Personnel Board's claim that the Eleventh Circuit's finding in this regard is wrong is blatantly false. Personnel Board Br. at 6,7.

Those complaints challenged actions taken by the City of Birmingham and the Personnel Board in race and gender-based employment practices which the City and Board contended were required or permitted by the consent decrees entered in this case. The various complaints were eventually consolidated before District Judge Pointer under the master caption file *In re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-903-S, hereinafter "BRDEL". R2-1 (April 12, 1984).

In December 1985, Judge Pointer tried the claims of the first fifteen white male employees of the BFRS or Engineering Department that filed complaints in *BRDEL*. The district court had previously determined that the white male employees could not challenge actions required or permitted by the Decrees. R2-54, 55. The trial therefore focused on the City's conduct in implementing the City Decree and whether its actions were outside the limitations of City Decree paragraph 2.[7] The Court agreed that but for the race conscious decisions challenged here each plaintiff would have been promoted. A69. Finding that the plaintiffs had failed to demonstrate that the City and Board were acting in violation of the consent decrees, the court entered judgment for the defendants.[8] The

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[7] Paragraph 2 provides, in relevant part, that "nothing herein shall be interpreted as requiring the City to . . . promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure." App. 112a.

[8] The initial opinion of the district court was delivered from the bench on December 20, 1985. A65-105; *BRDEL*, 39 FEP Cases (BNA) 1431 (N.D.Ala. 1985). Those findings were modified and supplemented following Rule 59 motions. See, R5-275, 276. Respondents challenged the findings that the challenged promotions were taken pursuant to the Decree in the first appeal, but the Court of Appeals never reached them because it reversed and ordered a new trial on the primary issue of preclusion. See, *BRDEL*, 833 F.2d 1492 (11th Cir. 1987), Brief of Appellants Wilks, et al., case no. 86-7108 (pp. 70-71) and Brief of the United States. The notion

(Footnote continued)

Eleventh Circuit reversed and this Court upheld the judgment of the Eleventh Circuit. *In re: Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom., Martin v. Wilks*, 490 U.S. 755 (1989).

This Court found that it was incorrect to bind the white male plaintiffs, as nonparties, to the provisions of the decrees. Rather, plaintiffs remained free to challenge actions taken pursuant to the decrees as violative of their rights under Title VII or the Fourteenth Amendment. 490 U.S. 755, 769. The Eleventh Circuit also directed the district court on remand to apply heightened scrutiny to the City Decree:

> The City Decree does contain a provision -- paragraph 2 -- that facially serves to protect the interests of nonminority employees. In light of the district court's interpretation of paragraph 2, however, that protection is illusory at best. The district court's interpretation of the City Decree permits the City to make race conscious promotions without using any job-related selection procedure. Given the natural potential that such an arrangement will trammel the interests of nonminority employees, we are compelled to the conclusion that the district court should subject the consent decrees to heightened scrutiny under the second prong of the *Johnson* analysis when it tries the individual plaintiffs' claims.

BRDEL, 833 F.2d at 1501.

Following the 1989 decision of this Court, the district court articulated a view that prospective relief in *BRDEL* should be governed by modification proceedings in the original consent

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that *all* of the district court's 1985 findings are undisturbed or are law of the case is wrong. See Martin Pet. at 7, 9 n.8. Each of the district court's decisions has been reversed in relevant part.

decree case. The district court further noted that the law is now clear that it is advantageous to have all interested parties before the court in the consent decree proceedings and thereby invited the non-black male employees to participate in the consent decree litigation.

D. The Modification Proceedings.

On March 29, 1990, the plaintiffs in *BRDEL*, Robert K. Wilks, et al., filed a motion to intervene in the consent decree cases and consolidate the two matters for further proceedings. R1-54. The district court granted intervention but denied consolidation. R1-77. The United States and the Wilks plaintiff-intervenors then moved the court to modify the decrees.

On May 21, 1991, the district court entered an Order and Opinion which acknowledged that the goal provisions of the 1981 Decree would not pass muster under current caselaw and modified the goals to some extent. App. 84a, 102a. Dissatisfied with the limited extent of the court's modifications, the Wilks plaintiffs and United States appealed. The Eleventh Circuit reversed the district court's decision and provided detailed instructions for the district court to vacate the goals of the Decree and construct a new valid remedial plan, to the extent one is still necessary. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). No party sought review of that decision by this Court.

E. The 1991 Trial and Decision of the District Court.

On October 21, 1991, the district court held a supplemental trial on plaintiffs' reverse discrimination claims. The evidence submitted at the 1985 trial was still before the district court and there was no need to repeat the presentation of that evidence. R12-13. Additional oral and documentary evidence was submitted. Plaintiffs submitted extensive evidence demonstrating the process by which the affirmative action

plan as embodied in the 1981 City Decree was negotiated and constructed.

On August 4, 1992, the district court entered its Order and Final Judgment dismissing the claims of the fifteen employees whose claims were tried at the 1985 and 1991 trials. App. 69a. In its Opinion, App. 71a, the court found that the race-based relief incorporated into the 1981 Decrees was permissible under both Title VII and the Constitution. The district court held that the City had met its burden of proving that its adherence to the decree was a valid defense. First, the district court rejected plaintiffs' contention that the City must make findings of past discrimination in order to justify its adoption of a race-conscious plan and, rather, adopted the view that "the issue is whether at the time it agreed to the consent decree the City had a strong basis in evidence for believing that there had been discrimination against blacks (and women)." App. 76a, n.4. In support of the decrees, the district court cited: (1) its 1976 finding that the entry level tests for the Fire and Police Departments violated Title VII; (2) "the discriminatory restrictions on these entry level positions meant, of course, that blacks had been denied the opportunity to hold higher level positions in these departments;" and (3) that other evidence was submitted in 1979 "attacking scores of other tests and selection devices administered by the Personnel Board . . ." App. 77a-78a. On that basis the district court found that the first prong of the analyses required by *Johnson* (Title VII) and *Croson* (Equal Protection) had been satisfied. App. 76a.

The district court characterized *Croson's* second prong -- narrow tailoring -- as a "closer question." App. 78a. The court found that the City Decree satisfied considerations of flexibility and duration because it did not require the hiring of unqualified persons. The court described the Decree as "requiring" the reflexive promotion of blacks on a one-for-one basis:

> Instead, [the Decree] requires that, when both black and white firefighters are certified to the Fire Department as qualified applicants for a promotion, the Department will alternate between blacks and whites, selecting the white or black applicant who is ranked highest according to the Board's ranking procedure.

App. 79a-80a. The court also found the Decree sufficiently narrowly tailored because it seeks a long term goal of achievement of a work force mirroring the representation of blacks and women in the Jefferson County labor force based on 1980 federal census data.[9] The district court noted that the interim goals for promotion to Fire Captain and Fire Battalion Chief were appropriate because they "were tied to black representation within [the Fire] Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department. App. 82a. Surprisingly, the district court made no mention of the 50% annual goal for promotions to Fire Lieutenant and the basis on which it implicitly found the goal to be valid. *Id.* That goal has been the focal point of this litigation. Finally, the court found the burden on the plaintiffs was "acceptable" because there "were no provisions to use layoffs as a means for favoring junior black employees over more senior white employees, nor was there an absolute bar to promotions for white Department members, since half of the promotions would be whites." App. 83a. No mention was made of the justification for the Engineering Department goal.

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[9] The suggestion by the petitioners that they could have chosen the larger black population of the City of Birmingham proper as the relevant labor pool is a recent fabrication. City Pet. 7, n.3; Martin Pet. 13. The evidence submitted by the City's own expert did not use the City of Birmingham civilian labor force as the relevant labor pool. App. 252a-256a.

F. The Decision of the Eleventh Circuit.

On appeal by the Wilks plaintiffs, the Eleventh Circuit reversed with instructions to provide a remedy to the plaintiffs. App. 54a.

Employing the district court's 1985 findings of fact, the Court of Appeals confirmed that the City promotes from two separate lists of black and non-black candidates, never compares the relative qualifications of competing candidates for promotion and simply promoted in rank order with "alternate selections between the top name on the black list and the top name on the non-black list until the available openings are filled." App. 18a. Hence, the Eleventh Circuit noted, "employees who will eventually fill an opening in the BFRS are pre-selected by race." App. 19a. The appeals court found:

> Among employees certified by the Board as eligible candidates, promotions are awarded solely by race. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks.

App. 20a.

Unlike the district court, the Eleventh Circuit separately evaluated the claims of the Wilks respondents under Title VII and the Equal Protection Clause. App. 15a, 20a. The appeals court evaluated the Title VII claim under the standard of *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) and the constitutional claim under the standard of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The appeals court upheld the district court's finding that the "City had strong evidence before it to believe it had engaged in past racial discrimination when it entered the consent decree," App. 31a, 32a, and therefore satisfied the first prong of

the *Johnson* analysis. Considering the second prong of the *Johnson* test -- unnecessary trammeling of the interests of nonminorities -- the Eleventh Circuit found that the City's use of race as the "sole factor" in making promotions from "separate lists to fill openings allocated by race" was the very sort of racial quota plan cautioned against by this Court in *Johnson*. App. 33a. Finding the 50% annual promotional quota "arbitrarily-selected" and "unduly restricting the promotional opportunities" of non-black firefighters when blacks represented only 9% of the pool of possibly-qualified applicants for promotion to a job requiring special training and qualifications, the Eleventh Circuit found the City unnecessarily trammeled the rights of the respondents. App. 36a, 37a. The court determined that trammeling was clear due to the fact that -- unlike a case involving a valid hiring goal -- this case involves a promotional quota where a small group of nonminority promotional applicants had to shoulder the entire burden of a remedy that bore no reasonable relationship to the representation of blacks among firefighters qualified for promotion. App. 37a-39a.

The Eleventh Circuit also found the City in violation of the Equal Protection Clause of the Fourteenth Amendment under the standards of analysis provided in *Croson* and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986). The appeals court found "the City had a compelling interest in providing a remedy for its prior discriminatory employment practices,[10]

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[10] Respondents continue to maintain, as they did in the lower courts, that the City lacked a sufficient compelling governmental interest grounded in either actual findings of past discrimination or an adequate record of past discrimination to justify a race-based remedy for *each* job classification in *each* department of the City's employment structure -- and particularly with respect to the Fire Lieutenant, Fire Captain and Civil Engineer jobs at issue in these challenges. The Eleventh Circuit erroneously equated the requirements of past discrimination with the manifest imbalance test of

(Footnote continued)

but that the City's use of race in its affirmative action plan was not narrowly tailored to achieve that interest as required under the Equal Protection Clause." App. 41a. The appeals court noted that the Decree was not intended to provide relief to identified victims of past discrimination, there was no sufficient consideration of race-neutral alternatives, and pre-decree efforts of the City to increase black representation in the BFRS with limited referral goals from the Board were "encouraging not ineffective" as found by the district court. App. 44a-46a. Moreover, the City made no effort to consider less onerous racial solutions, such as a plan like that approved in *Johnson*, than the strict quota eventually implemented by the City. App. 47a. Rather than providing a "proper remedy for past discrimination," the Eleventh Circuit found that the City's imposition of a "50% annual quota for promotions of blacks" was "designed to achieve the unconstitutional objective of outright racial balancing." App. 49a. Such a "rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination" and is ". . . instead an approach designed to achieve government-mandated racial balancing - the perpetuation of discrimination by government." App. 51a. The appeals court found the 50% goal for promotion to Fire Lieutenant bore no relationship to the relevant labor market of blacks within the ranks of trained firefighters. App. 51a, 52a. Finally, the court found the Decree's impact on the Wilks plaintiffs excessive due to the open duration of the decree and the elimination of half of all promotional opportunities for nonblacks on the sole basis of their race. App. 52a, 53a.

Title VII. App. 42a. Respondents contend that the City's plan does not pass muster under either prong of the *Croson* or *Johnson* analyses.

SUMMARY OF THE ARGUMENT

In a painstakingly thorough opinion, the Court of Appeals for the Eleventh Circuit found that the City of Birmingham engaged in race-conscious actions that clearly violate the permissible limits of lawful affirmative action under this Court's precedents. The petitions of the City of Birmingham and those representing the interests of black employees should be denied.

The Eleventh Circuit's finding that the City's inflexible one-for-one promotional quota program is unlawful is entirely consistent with *Croson, Paradise, Wygant, Johnson, Weber* and the decisions of other Courts of Appeals dealing with similar issues. Moreover, the Eleventh Circuit's decision strictly scrutinizing Birmingham's conduct is consistent with the current national agenda to take a hard look at affirmative action to ensure against abuses.

The City of Birmingham's complaint that it has been forced to endure a twenty year gauntlet of employment litigation, City Pet. 17-18, ignores the fact that Birmingham is in a dilemma of its own making. The City has steadfastly defended its right to engage in a strict program of quotas throughout this litigation and sought to blame everyone -- the Department of Justice, the Personnel Board, the white employees and the courts -- for its problems. The truth is that the City's quota program is consistent with the racial-political agenda of those in power in City government.

Respondents have endured a fourteen year battle to assert their right to fair and nondiscriminatory treatment by their employer. While the issue of valid affirmative action is an important one, respondents urge this Court to deny certiorari so they may now obtain their long-denied remedy.

ARGUMENT

I. The Eleventh Circuit's Decision Is Consistent With Current Precedent Governing Valid Affirmative Action.

A. *Croson* Provides The Standard For Constitutional Scrutiny of the City's Conduct.

Seeking to avoid the rules governing voluntary race-based affirmative action announced in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the City contends that *Croson* is of little relevance in evaluating race-based action taken pursuant to a consent decree. Rather, petitioners rely on *Weber* (a Title VII case), the plurality opinion in *Paradise*, and *Sheet Metal Workers* (court-ordered remedy for an egregious continuing Title VII violation).[11] City Pet. 8, 9; Martin Pet. 10-13.

It is well-settled that this Court's decision in *Croson* represented a landmark decision settling the standard for evaluation of voluntary race-conscious efforts. Municipal remedial race-based conduct should be subjected to strict and searching scrutiny. *Croson*, 488 U.S. at 494. That standard and the *Croson* analysis apply to employment cases as well as cases involving programs to encourage minority participation in public contracts. 488 U.S. 501.[12]

The City petitioners seek recognition of different -- but undefined -- standard for voluntary race-based conduct taken pursuant to an employment consent decree. City Pet. 8. In

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[11] *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *United States v. Paradise*, 480 U.S. 149 (1987) (plurality op.); and *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 221 (1986) (plurality in relevant part).

[12] *Croson* has been uniformly applied to cases involving race-based voluntary action by a state actor. *See Podbesesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (receipt of state scholarship aid).

BRDEL, 833 F.2d 1492 (11th Cir. 1987), *affirmed*, 490 U.S. 755 (1989), now law of the case, the Eleventh Circuit confirmed that the City's conduct was voluntary race-based action to be evaluated under the standards applicable to a purely voluntary affirmative action plan. See also, *Local 93, Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1987) ("there does not seem to be any reason to distinguish between voluntary action taken in a consent decree and voluntary action taken entirely outside the context of litigation"). The law is settled that there is no basis for creating a different rule for affirmative action embodied in a consent decree. Nor do the defendants suggest any policy reasons for a different standard.

Every Court of Appeals that has evaluated race-based affirmative action by a public employer has recognized that the rules of *Croson* govern the issue of constitutional validity. *See, Stuart v. Roache*, 951 F.2d 446, 449-50 (1st Cir. 1991) (Breyer, Ch. J) (evaluating decree under *Croson* strict scrutiny standard); *Hayes v. North State Law Enforcement Officer Association*, 10 F.3d 207 (4th Cir. 1993); *Edwards v. City of Houston*, 37 F.3d 1097, 1112 (5th Cir. 1994); *United Black Firefighters Association v. City of Akron*, 976 F.2d 999, 1008 (6th Cir. 1992) ("Croson does not exempt consent decrees from its requirements."); *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (en banc, Posner, J.), *cert. denied*, 114 S. Ct. 290; *Davis v. San Francisco*, 890 F.2d 1438 (9th Cir. 1989); *Cunico v. Pueblo School District*, 917 F.2d 431 (10th Cir. 1990); *Peightal v. Metro Dade County*, 940 F.2d 1394 (11th Cir. 1991). Nevertheless, the City of Birmingham contends *Croson* does not apply, while the Martin petitioners simply ignore *Croson's* existence. Their argument that *Croson* does not apply when evaluating race-based conduct of a public employer taken pursuant to a consent decree is meritless and not worthy of review by this Court.

B. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedents.

Respondents rely heavily upon the *Paradise* plurality opinion, *Sheet Metal Workers* and *Weber* in urging this Court to grant review. They effectively claim that the approval of race-based set asides in those cases mandate approval of all racial set asides. None of those cases involved voluntary action by a municipal employer. *Paradise* and *Sheet Metal Workers* involved judicially-crafted remedial plans imposed upon recalcitrant defendants. *Weber* involved an entry-level training program adopted by a private employer.

In *Paradise*, the plurality opinion relied upon by petitioners described a twelve year history of violation after violation of court orders and consent decrees by the Alabama Department of Public Safety in developing fair and nondiscriminatory selection procedures to remedy an egregious constitutional violation. 480 U.S. 167-73. Only after the State of Alabama failed to honor several deadlines it has previously agreed to for the development of fair tests, and faced with the State's claim of an urgent need to promote sixteen troopers to corporal, did the district court order the State to reserve 50% of the promotional positions for blacks *until such time as a nondiscriminatory selection procedure was in place*. 480 U.S. 178. The district court's order had the desired coercive effect of forcing the Department of Public Safety into prompt compliance with federal law when it promptly adopted fair selection procedures immediately after the first round of promotions thereby nullifying the racial remedy in short order. 480 U.S. 179. In *Paradise*, the district court's efforts to use less intrusive remedies were ineffective in the face of official obstruction by the State of Alabama.[13] Here, the case is the

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[13] The Eleventh Circuit recognized this factor is distinguishing *Paradise*:

(Footnote continued)

exact opposite. Birmingham desires to promote in a strictly racial fashion and has no interest in the development of race-neutral selection procedures.

Sheet Metal Workers, a Title VII case, involved a recalcitrant New York City construction union that for many years had repeatedly violated court orders to open its membership to blacks.[14] Only after exhausting more limited remedies did the district court set a 29% nonwhite membership goal based on the percentage of nonwhites in the relevant labor pool. There is nothing in *Sheet Metal Workers* that conflicts with the Eleventh Circuit's decision here.

Finally, *Weber* was a Title VII case involving a training program for entry level jobs in a private plant in Louisiana. The approval of a goal for admission to a training program for unskilled laborers in a private-sector Louisiana plant can hardly dictate the result of the Constitutional analysis of a hard 50% quota for promotions of Fire Lieutenants by the City of Birmingham. Moreover, some have suggested that *Weber* may be due to be reconsidered and overruled. *Johnson*, 480 U.S. 657 (White, J.) and 670 (Rehnquist, Ch.J., and Scalia, J.). Respondents believe the *Weber* analysis has been abused and is not limited to remedying manifest imbalances

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> This, however, is not a case like *Paradise*, where the district court ordered a remedy to combat on egregious refusal to follow its prior orders to end discriminatory practices. This is a case where, to end pending litigation, the City voluntarily entered into a consent decree containing a quota-based affirmative action plan that cannot withstand scrutiny.

App. 39a.

[14] Petitioners fail to point out that the portions of the *Sheet Metal Workers* opinion they rely upon (Parts IV and V of Justice Brennan's opinion and a portion of Justice Powell's separate opinion) failed to command a majority of the Court.

in traditionally segregated job categories but has been a vehicle for racial- and gender-balancing by public and private employers interested in social goals of diversity. *Id.* If review is granted, *Weber* should be reconsidered and overruled.

The notion that *Paradise, Sheet Metal Workers* or *Weber* should dictate the result in this case is wrong. The Eleventh Circuit carefully considered the various factors identified in those cases, as well as *Johnson, Wygant* and *Croson,* in evaluating the City's conduct and determined that the City's actions violated Title VII and the Constitution. The fact that the Eleventh Circuit reached a different result when it evaluated the unique facts of this case does not mean that its decision conflicts with this Court's precedents.

C. The Eleventh Circuit's Decision Is Not In Conflict With Other Circuits.

The City of Birmingham's argument that the decision of the Eleventh Circuit is in conflict with recent decisions of the Fifth and Sixth Circuits is also meritless. City Pet. 14.

The City claims that the court in *Aikens v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994), "upheld a provision of a decree which actually mandated that, without regard to the percentages of blacks at the entry level positions, the Memphis fire department must reserve at least twenty percent of the annual promotions for blacks. . ." City Pet. 15. That is not accurate. First, the court carefully determined that during the relevant period when promotions to police sergeant were made, 32.4% of the persons in the lower rank were black; during the period when fire lieutenant promotions were made, 15.3% of the persons in the lower rank were black; during the period when promotions to fire investigator were made, 34.3% of the persons in the lower classification were black; and, during the period when fire battalion commander promotions were made, blacks constituted 20% of the persons in the lower ranks.

Under such circumstances, one can hardly dispute a 20% annual goal, assuming all other provisions of a valid plan are in place. Second, the Sixth Circuit found that there were unresolved issues of fact underlying the question of whether the goals of the Decree were narrowly tailored. The court reversed the grant of summary judgment for the defendant City and remanded for full trial of the plaintiffs' claims of unlawful reverse discrimination. The appeals court was concerned about the use of civilian labor force statistics as a long term goal for a promotional position requiring special skills: "there indeed is a possibility that the racial composition of the qualified labor pools for these positions will materially differ from that of the general Shelby County labor force." The Sixth Circuit's decision is not inconsistent with the Eleventh Circuit's evaluation of Birmingham's race-based conduct.

There is also no inconsistency here with the decision of the Fifth Circuit in *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994). That court evaluated a proposed consent decree under the standards of *Johnson* and *Croson* and found that it passed muster under both Title VII and the Equal Protection Clause. Unlike the situation in this case, the relief in *Edwards* was carefully crafted to the extent of proven discrimination in promotions to the particular job involved, was clearly linked to the relevant qualified labor pool, was limited in duration, and required the prompt institution of valid bias-free selection procedures. Moreover, the employer created additional positions, at its expense, to assist in the implementation of the remedial plan by eliminating any loss of expected promotions for nonminority employees. The Eleventh Circuit made contrary findings on each of those factors. There is no conflict in the law of the circuits to warrant review by this Court.

II. The Eleventh Circuit Correctly Found The City's Affirmative Action Plan Was Overbroad In Violation Of *Croson*.

Under the various decisions of this Court addressing remedial affirmative action, there are a number of factors to be evaluated in determining whether a plan is narrowly tailored. Using any of the factors identified in *Bakke*, *Wygant*, *Paradise* or *Croson*, it is clear that the Eleventh Circuit's ruling that this plan is not narrowly tailored is due to be upheld. Here, the Eleventh Circuit correctly recognized that the 50% quota was arbitrarily chosen and bore no relationship to the representation of blacks in the pool of persons arguably qualified to be promoted to Fire Lieutenant.

"Under strict scrutiny the means chosen to accommodate the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280; *Fullilove v. Klutznik*, 448 U.S. 448, 480 (1980). The classification should fit "with greater precision than any available alternative." *Wygant*, at 280 n.7. Courts should ". . . give particularly intense scrutiny to whether a nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well . . . ." *Wygant*, at 280 n.6.

The Eleventh Circuit found that no effort was made to develop a nonracial remedy or even a less-intrusive racial plan. App. 44a-46a. The *Croson* Court noted the failure of the Richmond City Council to consider race-neutral means to increase minority participation. Recognizing that the alleged barriers to blacks were race-neutral, this Court suggested that ending such barriers would lead to increased minority participation in contracts. 488 U.S. 507. Rather than eliminate barriers, the City of Birmingham opted for the

administratively simple tool of across-the-board racial quotas for all City job classifications.[15]

The Eleventh Circuit recognized and the City freely admitted that it never considered any alternative remedies. App. 47a; 1991-PX-1, response 6. Nor did the City look beyond the goal of racial balancing based on black representation in the local population. "It rests upon the 'completely unrealistic assumption' that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, at 507. The City Decree was adopted in summary fashion with no consideration given to the individual components of the plan and the extent of their necessity in the various departments and levels of City government. App. 6a-9a. There were no realistic efforts to identify or redress whatever discrimination existed in the BFRS promotional process or the Engineering Department's promotional process.

The Eleventh Circuit correctly recognized that less intrusive remedies were available. These include elimination of points for seniority or implementation of new testing procedures. App. 46a-47a. The City gave no consideration to such alternatives. Race-neutral relief is realistic and should be the rule rather than the exception. If the elimination of any barriers to the promotional opportunities of blacks does not remedy a perceived violation, then an employer might consider stronger measures. Other less intrusive remedies could have

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[15] The recent decision of the Eleventh Circuit in the parallel modification proceedings makes clear that the day has come for Birmingham and the Personnel board to stop making administratively-convenient race-based employment decisions and move to implement fair and nondiscriminatory selection procedures with all deliberate speed. *See, Ensley Branch v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

included wide-band certifications,[16] referral goals, or other devices designed to increase the numbers of certified blacks. At that point Birmingham still could have selected in a non-discriminatory manner. Other recognized but less intrusive remedies than rigid quotas would include double filling[17] or, if all other less intrusive remedies failed, promotion goals for identified victims of past discrimination based on representation among fire fighters qualified for promotion or applicant flow. App. 47a. Under no circumstances, however, were the defendants justified in adopting a program where race was the only relevant criteria for promotional decisions and half of the jobs were set aside for blacks.

Second, the *Croson* Court wrote, "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." Thirty percent was a number arbitrarily chosen by the City of Richmond as a pure set aside. The Eleventh Circuit found that Birmingham's 50% set aside is not tied to any realistic goal.[18] App. 51a-52a. Half of the

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[16] The wide band certifications in *Paradise II* were recognized by the Eleventh Circuit as merit-based and fair to all applicants, regardless of race. *Paradise v. Prescott*, 767 F.2d 1514, 1537-1538 (11th Cir. 1985). *See also Bridgeport Guardians v. City of Bridgeport*, 933 F.2d 1140 (2d Cir. 1991) ("the banding remedy ordered by the district court provides some relief to other disadvantaged minority candidates by increasing at least the possibility that some of them will receive promotions").

[17] *See Youngblood v. Dalzell*, 804 F.2d 360, 363 (6th Cir. 1986).

[18] The City has acknowledged that the 50% set aside was not based on any appropriate criteria. See 1991-PX-1, Response 3. In earlier briefs in this litigation, Birmingham claimed the 50% quota was permissible because a 50% ratio was approved by this Court for the training program at issue in *Weber*. See, Eleventh Circuit case no. 86-7108, brief of defendant-intervenors Martin, et al. at 24; adopted by reference in City brief at 26, n.24. Such a position is without merit. The *Croson* Court rejected the notion that "findings" of discrimination or past societal discrimination can be shared from jurisdiction to jurisdiction. See, 488 U.S. 505. The approval in

(Footnote continued)

promotions were allocated to blacks at time when blacks represented between nine and thirteen percent of the relevant labor pool.[19] App. 53a. The Eleventh Circuit correctly determined that such a set aside is not designed to ensure against discrimination in making promotions but, like the program in *Croson*, is a program of outright racial balancing. App. 53a.

There is no dispute that the City implemented its quota program in a strict and unyielding manner. The City ignored the provisions of paragraph 2 of the Decree that allowed flexibility in its implementation. If blacks were certified, they were almost always promoted. Indeed, the district court interpreted the Decree as "requiring" a set aside of half the jobs for blacks. App. 79a-80a. Incredibly, at one point the City promoted seven blacks deemed "not qualified" by its own review board over available whites deemed qualified. 1991-PX-7 (pp. 165-71). Similarly, when the City exhausted the supply of available blacks from the 1982 and 1983 Fire Lieutenant registers, it stopped promoting anyone until a new register became available rather than promote white candidates. It is

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Weber of a 50% quota for a private sector training program at a plant in Louisiana hardly can serve to justify a 50% promotional set aside in the BFRS.

[19] *Compare, Stuart v. Roche*, 951 F.2d 446, 451 and 454 (1st Cir. 1991) (Breyer, Ch.J.) ("The Decree compares the number of black sergeants, not with the Boston population in general, but with those police officers with the minimum qualifications needed to become sergeants. Given the level of skill and training necessary to be a fire officer and the fact that all fire officers are drawn from the pool of incumbent fire fighters, it is undisputed that blacks represented some 9 to 13% of the relevant qualified labor pool. Reliance on the relevant labor pool is necessary in determining both the scope of the injury and the extent of the remedy necessary. "*Hazelwood [School District v. United States*, 433 U.S. 299 (1977)] demonstrates this Court's focus on prior discrimination as the justification for, and the limitation on, a State's adoption of race-based remedies." *Wygant*, 476 U.S. at 275.

undisputed that the City never considered qualifications of promotional candidates and promoted strictly on the basis of race. 1985-PX-31, 36; R5-276. The City used no job-related selection procedures and made no effort to implement such procedures. R5-276.

Birmingham did not narrowly tailor the Decree to the evidence produced at the earlier trials in the litigation. It aggressively implemented race-based programs that were consistent with its political agenda and significantly reduced its financial exposure. The Eleventh Circuit correctly found that the City plan is not narrowly tailored in the manner required by the Constitution.

III. The City Has Unlawfully Trammeled The Interests Of Plaintiffs In Violation Of Title VII.

The Eleventh Circuit also found that the City Decree, as implemented, unnecessarily trammeled respondents' interests in violation of Title VII. *See, Johnson*, 480 U.S. at 630. When the City injected race into the promotional process, it took on a corresponding duty to use race carefully and to the least extent necessary to achieve a remedial purpose. Rather than carefully tailor its program to ensure that nonminority expectations of promotion were not unreasonably curtailed, the City attacked the problem with the sledgehammer of a 50% quota. While the *Johnson* annual goal of 6% was considered realistic in view of the relevant qualified labor pool for the job at issue, the 50% annual goal here clearly is overbroad when one considers that blacks represented between 9 and 13% of the persons in the fire fighter classification during the years plaintiffs were denied promotions. The 50% quota was not tied to anything except outright racial balancing. App. 38a. The district court's Opinion identified no justification for such a goal. App. 71a, 81a.

In *Johnson*, this Court found the 6% interim annual promotional goal a realistic approach, based on the number of women in the qualified labor market, when women held none of the 238 positions in the relevant job classification. Perhaps more important, though, was the *Johnson* goal's reliance on individual qualifications as the paramount factor in evaluating candidates for promotion. No job was set aside for anyone. As in the Harvard plan approved by Justice Powell in *Bakke*, all candidates in Santa Clara program were carefully considered on the basis of their individual qualifications and no position was reserved on the basis of race or sex. While gender was a single "plus" factor in the evaluation process, qualifications controlled the final decision. On the other hand, this Court made clear that a plan which did not allow for the evaluation of relative qualifications and was based solely on achievement of numerical goals would not pass muster:

> By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers . . . .

480 U.S. at 636. As the City freely admitted, the relative qualifications of competing black and white employees in the BFRS promotional process were not considered. App. 18a. The City engaged in the sort of "blind hiring by the numbers" condemned in *Johnson*. The BFRS Chiefs acknowledged their firm obligation to meet the 50% set aside so long as the Board certified blacks. *Id.* The only factors considered in appointing

the black candidates were the fact of certification and race.[20] Such an inflexible program of set asides unnecessarily trammels the interests of nonminorities by completely shutting them out from half of the available jobs. In the promotional context, where the burden is not diffused over society generally, such trammeling is intolerable.

The Eleventh Circuit correctly found that the loss of a promotion is a serious injury warranting relief. App. 35a. First, the notion raised by the Martin petitioners that the burden on the respondents was slight is both offensive and wrong. Martin Pet. 17. Loss of a pay increase for working class families is a serious injury. Moreover, while some nonminorities received their promotions in a timely manner, others were denied promotion year after year, and others finally retired in frustration having never received their promotions.[21] The full impact of the promotional remedy fell on a small group of nonminority firefighters seeking promotion. The finding that the plan unnecessarily trammeled the interests of those individuals should be upheld. App. 34a-35a.

Defendants cannot contest the fact that they engaged in the sort of "blind hiring" by the numbers condemned in *Johnson*.

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[20] In upholding the plan in *Johnson*, Justice O'Connor noted that the employer "knew far more than merely the sex of the candidates and that they appeared on a list of candidates eligible for the job." 480 U.S. at 655-656. On the contrary, Justice O'Connor wrote, "an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of 'proportionate representation by race and sex,' would violate Title VII . . ." *Id.* The Eleventh Circuit correctly found this case presents exactly that sort of program.

[21] For example, respondent Chambers was denied a promotion in 1982 and never promoted prior to his recent retirement. Respondent Wilks was denied promotion for three successive years until he was finally promoted. Respondent Ware was never promoted to Civil Engineer.

Here, the district court and the persons responsible for implementing the program in the BFRS described the process as a set aside of 50% of the promotional positions for blacks. R1-110-8 and 10; 85-PX-31 (p. 217); 85 PX-36 (pp. 136-137, 175, 650); 85-DX-2235 (pp. 173, 176, 186). There was no careful investigation of qualifications. 85-PX-400 (pp. 422-426, 526, 527). There was no diffusing of the burden over a large group of individuals, no process to review the manner in which the program was implemented and no clearly defined annual period to assess progress. 85-PX-400 (pp. 468-470). There was no clearly defined time at which the program would end. 85-PX-400 (p.459). There was no less intrusive goal based on applicant flow, the relevant labor market or whether the preferred candidates were individual victims of past discrimination. While the City has claimed the Decree contains a "flexible waiver" provision in paragraph 2, it has acknowledged that it has ignored this provision. None of the plaintiffs had their individual qualifications considered or evaluated. Half the jobs were reserved for certified blacks. R1-110-10. Such a plan is clearly excessive and not worthy of further review by this Court.

Conclusion

For the foregoing reasons, the petitions for writ of certiorari should be denied.

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Respectfully submitted,

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